87-1972

No.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term 1987

Vernon Lee Bounds, et al.,

Petitioners,

v.

Robert (Bobby) Smith, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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Questions Presented For Review

This Court, in ***Bounds v. Smith,*** 430 U.S. 817 (1977), held that inmates have a constitutional right to meaningful access to the courts. North Carolina adopted a law library plan, which was approved by this Court. On August 14, 1984, the Fourth Circuit Court of Appeals remanded this case[1] to the district court to determine whether North Carolina was in compliance with its law library plan. As a result of the State's then counsel of record's gross failure to present evidence of compliance to the district court, the district court ordered the State to provide an attorney assistance plan. The State's motion to reconsider under Rule 60(b) of the Federal Rules of Civil Procedure was denied, although the State presented substantial evidence that it was in compliance with its law library plan.

1. Whether the denial of defendants' Rule 60(b) motion for reconsideration constitutes legal error amounting to an abuse of discretion when the motion was timely made, presented a meritorious defense, demonstrated a lack of unfair prejudice to the opposing party and presented exceptional circumstances as the state officials had timely provided evidence of compliance with their law library plan to their then attorney of record and he, unbeknownst to them, grossly neglected to present it to the court.

2. Whether the district court violated the law of this case, as established by this Court in ***Bounds v. Smith***, when it ordered the State of North Carolina to provide a lawyer assistance plan in place of their law library plan, which had been approved by this Court.

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1 ***Bounds v. Smith***, 430 U.S. 817 (1977), *sub. nom.* ***Harrington v. Holshouser,*** 741 F.2d 66 (4th Cir. 1984).

Parties To The Proceeding

Petitioners:

Vernon Lee Bounds, former Commissioner of the North Carolina Department of Correction
Stanley Blackledge, former Warden of Central Prison
R.L. Turner, former Superintendent of Odom Correctional Institution
James Holshouser, former Governor of the State of North Carolina
F.R. Moore, former Sergeant at Central Prison
Franklin L. Mahan, former Regional Superintendent
M.S. Lee, former Captain at Washington County Prison Unit

Respondents:

Robert (Bobby) Smith
Ronald D. Carnes
Richard A. Carter
Bradford Mizell Lilly
Donald W. Morgan
Franklin D. Strader
John H. Russell
John Harrington
Alonzo Watts
Clifton Speight
William Ryder
Ira Davis
Ronney McBride
Ray Forbes

Class certified on October 16, 1985 to include "all inmates currently held in North Carolina's prisons as well as all pre-trial detainees who are placed in prisons under the jurisdiction of the Department of Correction prior to conviction."

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The petitioners, former officials of the North Carolina Department of Correction, pray that this Court issue its Writ of Certiorari to review the *en banc* judgment of the United States Court of Appeals for the Fourth Circuit, filed March 3, 1988, which affirmed, by vote of 8-4, the panel decision of that court filed March 18, 1987.

Opinions Below

The opinion of the *en banc* Court of Appeals for the Fourth Circuit, affirming the panel decision, is reported at 841 F.2d 77 (4th Cir. 1988), and may be found in the appendix at A-28.

The opinion of the three-judge panel for the Court of Appeals for the Fourth Circuit is reported at 813 F.2d 1299 (4th Cir. 1987), and may be found in the appendix at A-14.

The opinions of the district court are reported at 610 F.Supp. 597 (E.D.N.C. 1985) (order finding defendants not in compliance

with law library plan for failure to present evidence of compliance), 657 F.Supp. 1322 (E.D.N.C. 1985) (initial order denying defendants' motion for reconsideration), and 657 F.Supp. 1327 (E.D.N.C. 1986) (final judgment ordering an attorney assistance plan to replace defendants' law library plan), and may be found in the appendix at A-51, A-570, and A-596, respectively.

Statement Of Jurisdiction

The decision of the *en banc* Fourth Circuit Court of Appeals on rehearing, which was granted by order entered June 18, 1987, was issued on March 3, 1988. This petition for writ of certiorari has been filed within ninety days of that date. Jurisdiction of the Court is, thus, invoked pursuant to 28 U.S.C. §1254(1).

Constitutional And Statutory Provisions Involved

This case involves issues arising under the **First and Fourteenth Amendments to the United States Constitution,** 42 U.S.C. §1983 and Rule 60(b) of the Federal Rules of Civil Procedure.

United States Constitution, Amendment I, provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

United States Constitution, Amendment XIV §1, provides:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of

> citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. §1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Rule 60(b) of the Federal Rules of Civil Procedure, Relief From Judgment or Order, provides:

> (b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons; (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation,or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason jus-

tifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., §1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independant action. (As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)

Introduction

This case involves a question of exceptional importance, going to the very heart of the "special delicacy of the adjustment to be preserved between Federal equitable power and State administration of its own law," ***Rizzo v. Goode***, 423 U.S. 362, 378 (1976), in that the decision of the Fourth Circuit Court of Appeals deprives the State of North Carolina of its option under this Court's decision in ***Bounds v. Smith***, 430 U.S. 817 (1977), to choose between attorneys and law libraries as the method for providing inmates their constitutionally guaranteed right of access to the courts.

Although the petitioners are officials of the North Carolina Department of Correction, the real parties in interest are the sovereign State of North Carolina and its taxpayers. We respectfully request that this Court review the 8-4 *en banc* decision of the Fourth Circuit Court of Appeals forcing the State of North Carolina to hire attorneys for its prisoners rather than provide law libraries as it has done for the past eleven years.

The defendants seek *only* an opportunity to present the evidence, which was timely made available to their former counsel but which unbeknownst to the defendants was not presented to the district court, that their law library system is in compliance with the Constitution and with the orders of the Fourth Circuit Court of Appeals and the district court. The defendants recognize that counsel originally assigned to this case *inexcusably* failed to present that evidence after having been directed to do so by the district court. However, the defendants implore this Court not to deprive the sovereign State of North Carolina and its people of their day in court because of their former counsel's dereliction of duty, of which the defendants were unaware, and without reason to be aware.

Statement Of The Case

This action began in the early 1970's by inmates challenging the adequacy of the North Carolina Department of Correction's legal research facilities. The district court in 1974 ordered the defendants to submit either a plan to provide inmates with adequate legal research facilities or some reasonable alternative. The defendants chose a law library plan, which was approved by the district court. That approval was affirmed by the Fourth Circuit Court of Appeals, ***Smith v. Bounds***, 538 F.2d 541 (4th Cir. 1975), and by this Court, ***Bounds v. Smith***, 430 U.S. 817 (1977).

In 1978 the district court, upon finding the defendants in compliance with their law library plan, dismissed the case. Plaintiffs appealed and the Fourth Circuit Court of Appeals vacated the district court's order, ***Harrington v. Holshouser,*** 598 F.2d 614 (4th Cir. 1979) ***(Harrington I),*** and remanded the matter for further consideration. (A-1)

After discovery and a hearing, the district court again dismissed the action. The plaintiffs appealed to the Fourth Circuit Court of Appeals, which affirmed in part, vacated in part, and remanded for fact finding on the following three issues of compliance: (1) training of inmate paralegals; (2) availability of copying facilities for indigent inmates; and (3) actual use versus requested use of the law libraries.

Harrington v. Holshouser, 741 F.2d 66 (4th Cir. 1984) (***Harrington II***). (A-6)

On December 21, 1984, the district court ordered the defendants to file within thirty days a certificate of compliance on the three issues noted in ***Harrington II***. (A-42) The defendants' in-house counsel, having received notice of this order, proceeded to gather the necessary information needed to show that the defendants were in compliance with their law library plan. (A-76) The defendants' in-house counsel contacted then-counsel of record, Special Deputy Attorney General Jacob Safron, to inquire as to exactly what he needed to demonstrate compliance. (A-77) Mr. Safron assured the defendants' in-house counsel that he would take care of the matter and would contact them if necessary. (A-78; A-577-578) Mr. Safron then deliberately and inexcusably failed to respond to the district court's December 21 order, and did not notify either the defendants or their in-house counsel that he had not responded to the district court's order. (A-73)

On January 30, 1985, the defendants not yet having filed any evidence of compliance, the plaintiffs moved the district court to find that the defendants were not in compliance. Again, Mr. Safron did not respond and there is no evidence in the record that he notified either the defendants or their in-house counsel of this motion. Nor is there any evidence that the defendants became aware of that motion through any other avenue.

On May 14, 1985, the district court, understandably incensed by the defendants' apparent contempt of its order, entered an order (1) finding that the defendants were out of compliance with their law library plan, and (2) directing the defendants to provide to the court a new plan which included attorney assistance. (A-51) This finding of noncompliance was entered without the district court receiving any evidence of noncompliance and without the plaintiffs or the district court ever attempting to compel the defendants to provide evidence of compliance. Simply stated, the district court found the defendants out of compliance because of Mr. Safron's failure to present to the court the evidence which the defendants had timely prepared and made available to him.

Immediately upon learning of the May 14, 1985, district court order, North Carolina Attorney General Lacy Thornburg, who had been in that office only since January 5, 1985 (A-74), appointed new counsel to represent the defendants. (A-69) On June 13, 1985, pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, the defendants, under the guidance of their newly appointed counsel, filed a motion for reconsideration of the district court's May 14, 1985 order. (A-70) Supporting this motion were affidavits showing that the defendants had complied with their law library plan. (A-76, 89, 103, 106, 138, 170) The plaintiffs have never contradicted the defendants' evidence of compliance. Nor have the plaintiffs shown that they were injured or prejudiced in any manner by Mr. Safron's flouting of the court's order. Nevertheless, the district court denied the defendants' motion for reconsideration in an order entered July 29, 1985 (A-570), although noting in the order that "the materials attached to defendants' motion [for reconsideration] do indicate that the state was making efforts to comply with its plan...."(A-571)

The defendants made two further attempts to persuade the district court to hear their evidence of compliance by filing two renewed motions for reconsideration. (A-580; A-587) Both were denied. (A-585; A-590) On April 10, 1986, the district court entered judgment replacing the defendants' chosen law library plan with a court mandated plan that provided for licensed attorneys. (A-596) The defendants appealed. (A-598)

The three-judge panel for the Fourth Circuit Court of Appeals entered its order on March 18, 1987, affirming the district court.[2] (A-14) The defendants petitioned for rehearing and suggested a rehearing *en banc*. A rehearing e*n banc* was granted and on March 3, 1988, the *en banc* order was entered, again affirming the district court. (A-

2 However, the Fourth Circuit panel also found that "[t]he documents submitted to the district court in support of the motion for reconsideration indicated that the state law library system may have been in compliance with constitutional requirements." 813 F.2d at 1303. (A-22)

28) Four members of the Fourth Circuit joined in a dissent, written by the Honorable H. Emory Widener, Circuit Judge. Judge Widener concluded that the district court had abused its discretion by denying the defendants' motion for reconsideration and that the district court had failed to comply with the Fourth Circuit's mandate. (A-30)

The defendants respectfully petition this Court to review the findings of the Fourth Circuit and district court.

REASONS FOR GRANTING THE WRIT

I. THE EXCEPTIONAL CIRCUMSTANCES IN THIS CASE, IGNORED BY THE LOWER COURTS, REQUIRE THIS COURT TO EXERCISE ITS SUPERVISORY POWERS.

Although the named defendants in this matter are officials of the North Carolina Department of Correction, the real parties in interest are the State of North Carolina and its taxpaying citizens. Having no remedy, the State of North Carolina and its taxpayers will bear the continuing burden of defendants' former counsel's gross negligence. The lower courts acknowledged that the defendants were most likely in compliance with their law library plan and that reconsideration would not prejudice the plaintiffs. Yet, in an apparent attempt to punish defendants' former counsel, the lower courts failed to acknowledge that their refusals to reconsider would cause a draconian punishment to the State of North Carolina.

On June 13, 1985, less than one month after the district court's May 14, 1985 noncompliance order, the defendants, through new counsel, filed a motion for reconsideration pursuant to Rule 60(b). (A-70) Affidavits attached to that motion demonstrated that defendants were in compliance with their law library plan and that Mr. Safron had the evidence of compliance available to him for timely presentation to the court. (A-72, 76, 89, 103, 106, 138, 170)

Plaintiffs' objections to the motion for reconsideration did not allege that they had suffered any actual injury during the approximately four and one-half month delay from the time the evidence

should have been presented and its presentation on June 13, 1985. Nor did plaintiffs' objections contain evidence, or reference to evidence, that defendants were not in compliance with their law library plan.

The district court denied the defendants' motion for reconsideration, although specifically finding that the motion was timely and that "the materials attached to defendants' motion indicate that the State was making efforts to comply with its plan," but held that the defendants had "totally failed to show exceptional circumstances in this case." (A-572) The district court ordered the defendants to submit a plan for attorney assistance to replace their law library plan, notwithstanding the evidence that the defendants were, most likely, in compliance with their law library plan.

The defendants filed two more motions for reconsideration with the district court (A-580; A-587), and both were denied. (A-585; A-590) In its order denying the third motion for reconsideration, the district court indicated that the defendants should have been aware of Mr. Safron's deliberate disregard of the district court's December 21, 1984 order to show compliance based on that attorney's past conduct in this case and glossed over the fact that the taxpayers of North Carolina would be ultimately responsible for funding the court-ordered attorney assistance plan. (A-594)

The Fourth Circuit, upon review, likewise found that the defendants' motion was "timely and premised on a meritorious defense." The Appeals Court also found that there was "no reason to believe that the plaintiffs would have been prejudiced by a reconsideration based on the merits of the defendants' argument that they are in compliance." 813 F.2d at 1303. (A-22) Again, however, there was a finding that the defendants had failed to show exceptional circumstances.

This is a clear case of exceptional circumstances. First, despite the district court's cursory dismissal of ***Naples v. Maxwell***, 368 F.2d 219 (6th Cir. 1966), *cert. den.*, 386 U.S. 971 (1967), and ***New York State Health Facilities Association, Inc. v. Carey,*** 76 F.R.D. 128 (S.D.N.Y. 1977), these are the *only* two cases either party

or the district court found which concerned gross negligence by state attorneys in their representation of the state.[3] In these cases, upon motions pursuant to Rule 60(b), the courts granted relief to the states. In the ***Carey*** case, the state attorneys not only failed to answer an amended complaint, but also failed to respond to plaintiffs' Application and Notice for Entry of Default Judgment. 76 F.R.D. at 129. It was not until the court entered a judgment by default, *some four-and-one-half months* after the original answer was due, that the state attorneys filed their Rule 60(b) motion. The ***Carey*** court, granting the Rule 60(b) motion, specifically distinguished its case from that of a private entity who was represented by private counsel since

> the real party in interest here is the State of New York. The citizens of New York had only the remotest control over the conduct of this case, through their civil servants. The Court believes it would be unfair to subject New York taxpayers to the added expense occasioned by this judgment, solely because of the neglect of their attorney.

76 F.R.D. at 133. The ***Carey*** case is quite similar to the one at bar. In both cases defendants' counsel did not timely respond to court orders on more than one occasion. In both cases the order granting defendants' 60(b) motion came as the result of a four-and-one-half month gap between the time for response and the entry of the court's order. In both cases the taxpayers, who had virtually *no* control over the state attorneys, faced the ultimate responsibility for the state attorneys' malfeasance. Burdening innocent taxpayers with a draconian penalty for a state attorney's grossly negligent acts is an abuse of discretion. The fact that it is the taxpayers and the State of North Carolina who are the real parties of interest is an exceptional

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3 The Fourth Circuit failed to mention either of these two cases in its opinions.

circumstance. *See* ***Dimmitt & Owens Financial, Inc. v. United States***, 787 F.2d 1186, 1193 (7th Cir. 1986).

Second, unlike a private citizen, the state officials in this case had no choice of counsel[4] and no avenue of relief from counsel's gross negligence, other than their motion for reconsideration. Unlike a private citizen, they cannot bring a malpractice action against Mr. Safron. Surely, this lack of remedy is an exceptional circumstance.

Third, contrary to the general rule that blameless defendants are entitled to reconsideration under Rule 60(b) when they have been deprived of their "day in court" by a grossly negligent attorney, recognized by even the Fourth Circuit, the defendants here were blameless and were denied their day in court. *See, i.e.*, ***Augusta Fiberglass Coatings, Inc. v. Fodor Contracting Corporation***, 843 F.2d 808 (4th Cir. 1988) (Rule 60(b) motion granted; district court failed to distinguish between the failure or neglect of counsel and the neglect of defendant); ***Lolatchy v. Arthur Murray, Inc.***, 816 F.2d 951 (4th Cir. 1987) (Rule 60(b) motion granted because defendants blameless and lesser sanctions available); ***Vincent v. Reynolds Memorial Hospital, Inc.***, 728 F.2d 280 (4th Cir. 1984) (Rule 60)b) motion granted as no other relief available to movant); ***United States v. Moradi***, 673 F.2d 725 (4th Cir. 1982) (Rule 60(b) motion granted due to attorney's rather than party's neglect); ***Fairfax Countywide Citizens v. Fairfax County***, 571 F.2d 1299 (4th Cir. 1978); ***Seven Elves, Inc. v. Eskenazi***, 635 F.2d 396 (5th Cir. 1981) (Rule 60(b) motion granted because defendants denied opportunity to present their case by gross neglect of their attorney); ***Boughner v. Secretary of Health, Education and Welfare***, 572 F.2d 976 (3d Cir. 1978) (Rule 60(b) motion granted due to gross neglect of plaintiffs' attorney); ***DeBonavena v. Conforte***, 88 F.R.D. 710 (D.Nev. 1981); ***United States v. Berger***, 86 F.R.D. 713 (W.D.Pa. 1980); ***Good Luck Nursing Home, Inc. v. Harris***, 636 F.2d 572 (D.C.C. 1980); ***Geronymo v. Joseph Horne Co., Inc.***, 80 F.R.D. 86

4 When these cases were initially consolidated in 1974, Mr. Safron was the *only* state attorney in the Attorney General's Office of North Carolina who represented the Department of Correction.

(D.C.Pa. 1978); ***Caruso v. Drake Motor Lines, Inc.,*** 78 F.R.D. 586 (E.D.Pa. 1978); ***King v. Mordowanec,*** 46 F.R.D. 474 (D.C.R.I. 1969) (Rule 60(b) appropriate for gross negligence of lawyer).

In response to the district court's December 21, 1984 compliance order, the defendants diligently prepared and made available to Mr. Safron materials showing their compliance. (A-76, 89, 103, 106, 138, 170) The defendants provided Mr. Safron with a copy of the amended Department of Correction inmate photocopying policy. (A-77; A-79) Additionally, defendants gathered evidence that inmate paralegals had been trained and that inmates had access to the law libraries. This information was made available to Mr. Safron and later submitted with defendants' initial motion for reconsideration. (A-72, 76, 89, 103, 106, 138, 170) Mr. Safron simply did not present the evidence of compliance to the district court, and he never advised the defendants that it was his intention to so abandon them. In fact, to the contrary, since the defendants had Mr. Safron's long history of able and successful representation of them in the district courts, as well as the Fourth Circuit Court of Appeals and this Court, they had no reason to believe Mr. Safron would not continue to ably represent them.[5] Thus, the defendants' diligent preparation of their defense in

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5 Judge Widener stated in his dissenting opinion:

> Mr. Safron was licensed to practice law in 1957. He joined the Attorney General's office of the State of North Carolina in 1968. He has personally appeared before the United States Supreme Court as counsel representing the State on seven occasions, successful in each. In this court, he has appeared 128 times, beginning in 1972, zealously representing the State. In an affidavit filed by Mr. Safron, he admitted with candor his neglect of duties in not responding to the December 21st order, and, expressing his deep regret and abject apology to the court for that neglect, took full responsibility. Additionally, James C. Woodard, Secretary of the Department of Corrections from 1981-84, filed an affidavit stating that he had no reason to doubt Mr. Safron's "most thorough" handling of the case as he had always done excellent work in the past for the Department.

this case, which was timely presented to their former counsel, coupled with former counsel's gross negligence in failing to present that evidence of compliance to the court, which was effectively an abandonment of the defendants, is an exceptional circumstance demanding reconsideration.

Fourth, the harshness of the district court's remedy is evident in the drastic difference in cost of the State's law library plan, $60,000.00 a year, compared to the estimated cost of the court's attorney assistance plan, $360,000.00 a year. Imposing a remedy six times the annual cost of the defendants' present plan year in and year out *forever* without a review of the defendants' present plan, is clearly an abuse of discretion. ***Compton v. Alton Steamship Co., Inc.,*** 608 F.2d 96 (4th Cir. 1979).

Fifth, the lower courts failed to consider any lesser sanctions prior to forcing upon the State of North Carolina an entirely new remedy. Mr. Safron could have been held in contempt or charged with plaintiffs' expenses attending delay, including attorney's fees. The defendants themselves could have been held in contempt. There is nothing in the record to suggest that any of these lesser remedies

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(FOOTNOTE 5 CONTINUED)

> In affidavits filed by Mr. Safron's coworkers on the case, the State showed that no one other than himself was aware of his ongoing negligence in answering the December 21, 1984 order. Despite this, the majority places the blame for a single attorney's actions on the State when the record shows that the State had little or no knowledge of the attorney's then contemporaneous actions and completely relied on his work, being assured by his past accomplishments. Mr. Safron had never shown dereliction in the past representing the State and the Department of Corrections, both of which placed their confidences in his abilities to properly conduct the case. The record discloses no reason that the State should have doubted his conduct of the ongoing litigation. But, despite these facts, the district court, and now this court, has foreclosed all consideration of the facts going to the merits of the case due to the neglect of one State's attorney who was in the sole position to monitor compliance with the district court's order.

841 F.2d at 80-82. (A-36-37)

would not have promptly cured the failure to respond. To the contrary, the May 14, 1985 order brought forth an immediate response, including appointment of new counsel for the defendants and the timely filing of substantial evidence of defendants' compliance with their law library plan. (A-69; A-70) The absence of any consideration of a lesser sanction is an exceptional circumstance meriting reconsideration.

Sixth, injunctive relief, especially mandatory injunctive relief, is an extraordinary remedy which should not lightly be granted, but should be used sparingly and cautiously after thoughtful deliberation and with a full conviction on the part of the court of its urgent necessity. In the case at bar the district court entered its order granting mandatory injunctive relief in the absence of *any* evidence establishing irreparable injury to the plaintiffs, which is a legal prerequisite for such relief. This was an impermissible interference in the internal operations of the defendants' prison system.

This Court has often recognized the "special delicacy of the adjustment to be preserved between federal equitable power and state administration of its own law." ***Rizzo v. Goode***, 423 U.S. 362, 378 (1976). Beginning in ***Younger v. Harris***, 491 U.S. 37 (1971), this Court barred federal intervention in state criminal proceedings holding that "Our Federalism" represents

> a system in which there is sensitivity to the legitimate interests of both State and National Governments, and in which the National Government, anxious though it may be to vindicate and protect federal rights and federal interests, always endeavors to do so in ways that will not unduly interfere with the legitimate activities of the states.

401 U.S. at 44. ***Younger*** was followed by a number of cases reiterating that principle. *See, e.g.*, ***Huffman v. Pursue, Ltd.***, 420 U.S. 592 (1975); ***O'Shea v. Littleton***, 414 U.S. 488 (1974).

This Court has not limited considerations of "Our Federalism" to cases in which an injunction is being sought against

the judicial branch of state government, but has also applied it when relief is requested against those in charge of an executive branch agency. Wright, ***The Law of Federal Courts*** **§52A** (4th Ed. 1983). In both ***Rizzo v. Goode***, *supra*, and ***City of Los Angeles v. Lyons***, 461 U.S. 95 (1983), this Court held that injunctive relief in suits under §1983 was inappropriate to govern the internal operations of state and local law enforcement agencies even though those operations were implicated in constitutional violations.

The application of the principles of federalism in these cases has

> established the principle that except in extraordinary circumstances where the danger of irreparable injury is "both great and immediate," a federal court may not issue an injunction that intrudes into the internal affairs of an executive branch of state government.

Note, ***Standing and Injunctions; The Demise of Public Law Litigation and Other Effects of Lyons,*** *25 B.C.L.Rev. 765, 780 (1984).*

There is a special reluctance to intervene in the operation of state institutions where

> [s]weeping use of federal equity power has obvious implications for federalism. When a judge undertakes systematic relief, he displaces the elected and appointed officials who normally supervise the state or local function that is the object of that litigation. Systematic relief typically goes beyond the traditional negative prohibition of telling an official not to do something and imposes affirmative obligations upon state or local officials. There is a genuine danger of a judge's "tunnel vision"; concerned with a problem placed before him in the particular lawsuit, for example appalling conditions in a mental hospital, he has no occasion to be concerned about the impact of his ruling on limited state or local financial resources. Understandably, the judge is likely to say that

> constitutional rights cannot be denied by an appeal to budget difficulties. As a result public resources may fund a function or service which is the subject of litigation at the expense of other valuable services not before the court. This is not intended to insinuate that a judge does not act out of felt necessity and on the basis of demonstrated need, but it does call attention to the extent which systematic reforms, undertaken through the federal court's equity powers, displace the normal democratic and political process.

Howard, ***State and the Supreme Court***, 31 Cath. L.Rev. 375, 426 (1982).

The plaintiffs clearly could have requested the district court to issue an order to the defendants to show cause why they should not be held in contempt for failure to respond to the court's December 21, 1984 order. Instead, foregoing their legal remedy, the plaintiffs requested the district court to impose extraordinary equitable relief with no showing that such relief was justified--in other words a request made in a vacuum. As stated by the Seventh Circuit Court of Appeals in ***Sangmeister v. Woodard***, 565 F.2d 460, 468 (7th Cir. 1977):

> As a general rule, courts of equity need not impose specific requirements absent some reason to believe that a less restrictive approach will fail to remedy the constitutional violation.... [There is a] need for evidence that state officials will continue to violate the constitution before specific remedies should be imposed. As the Court in ***Swann v. Charlotte-Mecklenburg Board of Education***, 402 U.S. 1, 28 L.Ed.2d 554, 91 S.Ct. 1267 (1971) stated: 'Judicial authority enters only when local authority defaults.' 402 U.S. at 16, 94 S.Ct. at 1276.

The defendant state officials in the case at bar were not violating the plaintiffs' constitutional right of access to the courts as is evidenced by the affidavits and documentation attached to their motion for reconsideration. The defendants had chosen a method by which to provide inmates with access to the courts and were in com-

pliance with their chosen method. The prerogative of prison officials to make that choice was clearly given by this Court in the case at bar and its progeny. ***Bounds v. Smith***, 430 U.S. 817 (1977); ***Hooks v. Wainwright***, 775 F.2d 1433 (11th Cir. 1985), *cert. den.*, ____ U.S. ____ (1986); ***Stevenson v. Reed***, 530 F.2d 1207, 1382 (5th Cir. 1976). The relief fashioned here by the district court was not the least intrusive necessary, but went far beyond the district court's proper judicial function. Thus, the district court violated the principles of federalism; the plaintiffs are clearly not entitled to the extraordinary injunctive relief granted them; and the district court abused its discretion in granting such relief.

Rule 60(b) "vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." ***Klapprott v. United States***, 335 U.S. 601, 615 (1948). The Fourth Circuit Court of Appeals has referred to Rule 60(b) as the "catch-all" clause because it provides a court with "a grand reservoir of equitable power to do justice in a particular case." ***Compton v. Alton Steamship Co.***, 608 F.2d at 106.

In a case similar to the one at bar, ***Seven Elves, Inc. v. Eskenazi,*** 635 F.2d 396 (5th Cir. 1981), default judgment was entered against the defendants due to their attorney's failure to appear in court and failure to notify them that he planned to no longer represent them. The Fifth Circuit Court of Appeals, vacating the default judgment because the defendants "were denied an adequate opportunity to present their case by the gross neglect of their attorney," 635 F.2d at 400, had the following to say:

> By its very nature, [Rule 60(b)] seeks to strike a delicate balance between two countervailing impulses; the desire to preserve the finality of judgments and the 'incessant command of the court's conscience that justice be done in light of *all* the facts.' In this light, it is often said that the rule should be liberally construed in order to do substantial justice. What is meant by this general statement is that, although the desideratum of finality is an important goal, the justice-function of the courts demands that it must yield, in appropriate circumstances, to the equities of the

> particular case in order that the judgment might reflect the true merits of the cause. (emphasis in original)
>
> * * *
>
> [W]here denial of relief precludes examination of the full merits of the cause, *even a slight abuse may justify reversal.*

Id. at 401-02 (emphasis added).

In another similar case, ***Boughner v. Secretary of Health, Education, and Welfare***, 572 F.2d 976, 977 (3d Cir. 1978), the Third Circuit Court of Appeals, granting a Rule 60(b) motion, characterized the plaintiffs' attorney's behavior as "egregious conduct amount[ing] to nothing short of leaving his clients unrepresented." The Third Circuit distinguished this type situation from that present in ***Link v. Wabash Railroad Co.***, 370 U.S. 626 (1962), because in ***Link*** this Court, dismissing the matter under Rule 41(b), "expressly indicates the aggrieved party never availed himself of a corrective remedy such as the 'escape hatch provided by Rule 60(b).'"[6] 572 F.2d at 978. The ***Boughner*** court added that a judgment that precluded an adjudication on the merits "constitut[ed] the 'extreme and unexpected hardship' addressed by the Supreme Court in *Swift* [***United States v. Swift***, 286 U.S. 106, 119 (1932)]." 572 F.2d at 979.

The defendants are not asking this Court to find them in compliance with their law library plan. All the defendants ask is that they be given a chance to show that they are in compliance with that plan. *The defendants simply want their day in court.* The defendants believe that the lower courts' refusal to "tap that grand reservoir of equitable

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6 This Court has made such references in other cases. *See, i.e.*, ***Kirby Forest Industries, Inc. v. United States***, 467 U.S. 1, 18 (1984); ***Browder v. Director, Illinois Dept. of Correction***, 434 U.S. 257, 272 (1978).

power" was an abuse of discretion and ask this Court to grant this petition so that they may show that the equities in this case are in their favor and merit reconsideration.

II. THE PETITION SHOULD BE GRANTED TO RESOLVE THE APPARENT CONFLICT AMONG THE CIRCUITS REGARDING THE FACTORS NECESSARY FOR GRANTING A RULE 60(b) MOTION BASED ON A STATE ATTORNEY'S GROSSLY NEGLIGENT REPRESENTATION OF THE STATE.

This Court's review of the Fourth Circuit's *en banc* decision, which adopted and briefly expanded the panel opinion, is warranted because that decision is in significant conflict with at least two other circuits which have had the opportunity to decide a Rule 60(b) motion based on a state attorney's grossly negligent representation of the State. *See, i.e.*, ***Naples v. Maxwell***, *supra*, and ***New York State Health Facilities Assn., Inc. v. Carey***, *supra*. These circuits, the Sixth and the Second, have held that a Rule 60(b) motion based on a state attorney's gross negligence should be granted.

In ***Naples v. Maxwell***, a state attorney made a recommendation to the district court, during a habeas hearing, which was contrary to the tenor of the State's brief. The district court, acting under that recommendation, granted the writ without a determination on the merits. Upon being informed of the situation, the Attorney General immediately filed a Rule 60(b) motion, claiming the assistant attorney general who had made the contrary recommendation was guilty of neglect in that he had no authority to make such a recommendation. 368 F.2d at 220. An affidavit to that effect was filed by the assistant attorney general. The district court denied the motion. The Sixth Circuit Court of Appeals reversed and remanded for a hearing on the merits, holding that the neglect of the assistant attorney general "was excusable and could not have been avoided on the part of the Attorney General, the counsel for the respondent," and that "[b]ecause of this neglect and in the interest of justice, under Rule 60(b)," the district court's order was vacated. 368 F.2d at 220.

In ***New York State Health Facilities Assn., Inc. v. Carey***, state attorneys failed to answer petitioners' amended complaint filed December 3, 1975, which challenged New York health regulations. Some three-and-one-half months later, petitioners filed for a default judgment and the state attorneys again failed to respond. On April 20, 1976, judgment by default was entered against the State, declaring the controverted regulations to be violative of both federal and state laws and the New York and federal constitutions. 76 F.R.D. at 129. Prior to the entry of default judgment, petitioners made numerous attempts to advise the state attorney of the default. 76 F.R.D. at 132.

Immediately following entry of default, petitioners sent a copy of the judgment to the actual defendants, who made no response. On August 5, 1976, over seven months after the defendants' original answer was due and three-and-one-half months after entry of default judgment, defendants filed a Rule 60(b) motion.

Although characterizing the defendants' delay as "egregious," and finding no excusable neglect, the district court granted defendants' motion under Rule 60(b)(6) because

> the real party in interest here is the State of New York. The citizens of New York had only the remotest control over the conduct of this case, through their civil servants. The Court believes it would be unfair to subject New York taxpayers to the added expense occasioned by this judgment, solely because of the neglect of their attorney.

76 F.R.D. at 133. Noting other cases which held that a client *is* responsible for his attorney's neglect, the court found this case distinguishable "on the *critical* fact that defendants herein are state officials represented by attorneys in the employ of the State." ***Id.*** (emphasis added). These defendants were not able to retain new counsel at will, such as could a private litigant. However, the court did propose a sanction for the defendants' unconscionable delay and neglect so as to give them incentive to litigate diligently:

> Since the purpose of reopening the default is to prevent one miscarriage of justice, not to cause another, prospectivity [for damages assessment purposes] will be measured from the date of the original judgment, April 20, 1976.

Id.

Viewed in the context of these two cases, it is apparent that there is a clear conflict between them and the case at bar. All the reasons given for granting the Rule 60(b) motions in the Second and Sixth Circuit cases are present in the case at bar and justify reconsideration. Accordingly, this issue warrants review at this time to resolve this conflict.

III. THE DISTRICT COURT VIOLATED THE LAW OF THIS CASE, AS ESTABLISHED BY THIS COURT IN *BOUNDS v. SMITH*, 430 U.S. 817 (1977), WHEN IT ORDERED THE STATE OF NORTH CAROLINA TO REPLACE ITS SYSTEM OF PROVIDING INMATES ACCESS TO THE COURTS WITH AN ENTIRELY NEW SYSTEM.

This Court held in 1977 in this case that

> the fundamental constitutional right of access to the courts requires prison authorities to assist inmates in the preparation and filing of meaningful legal papers by providing prisoners with adequate law libraries *or* adequate assistance from persons trained in the law.

430 U.S. at 828 (emphasis added). This Court went on to discuss, however, that this holding did not unduly intrude into the State's administration of its prisons because

> the courts below scrupulously respected the limits on their role. The District Court initially held only that petitioners had violated the "fundamental constitutional guarantee," ibid., of access to the courts ...

> [and] did not thereupon thrust itself into prison administration. Rather, it ordered petitioners themselves to devise a remedy for the violation, *strongly suggesting that it would prefer a plan providing trained legal advisors*. [Defendants] chose to establish law libraries, however, and their plan was approved with only minimal changes over the strong objections of [plaintiffs]. Prison administrators thus exercised wide discretion within the bounds of constitutional requirements in this case.

430 U.S. at 832-33 (emphasis added). Thus, the law of this case, as established by this Court, is that it is the *State's* choice of the manner in which it will provide inmates access to the courts. This Court even recognized that economic factors may be considered by a state when choosing its plan. 430 U.S. at 825.

The law of the case doctrine is clearly set forth in 1B **Moore's Federal Practice** ¶0.404[1], pp. 117-18 (1983):

> Under the doctrine of the law of the case, a decision on an issue of law made at one stage of a case becomes a binding precedent to be followed in successive stages of the same litigation. This principle has sometimes been thought of as a variety of the *res judicata* principle, and in the context of successive appeals thought to rest on jurisdictional principles. As applied in the federal courts today, it bears a close resemblance to the doctrine of *stare decisis*. Like *stare decisis*, it serves the dual purpose of: (1) protecting against the agitation of settled issues; and (2) assuring the obedience of inferior courts to the decisions of superior courts....A court that makes a decision has the *power* to reconsider it, so long as the case is within its jurisdiction. But after the law of the case is determined by a superior court, the inferior court lacks authority to depart from it, and any change must be made by the superior court that established it, or by a court to which it, in turn, owes obedience.

(Emphasis added).

The main purpose of the law of the case, then, is to "protect against the agitation of settled issues and assure obedience of lower courts to the decisions of appellate courts." ***Wheeler v. City of Pleasant Grove***, 746 F.2d 1437, 1440 (11th Cir. 1984). This Court specifically left to the State of North Carolina and its public officers the choice of which alternative to choose to provide inmates access to the courts. North Carolina chose a law library system. The lower courts do not have the authority to replace North Carolina's chosen system; the lower courts do, however, have the duty to ensure that North Carolina's chosen plan is constitutionally adequate.

The district court clearly had the option to issue an order to the defendants to show cause why they should not be held in contempt for failure to comply with the order to show compliance. In fact, the district court had a *duty* to ensure that North Carolina's law library plan is constitutionally adequate. Instead, the district court chose to ignore the law of this case and made its own choice of a plan to ensure inmates access to the court. This was a clear abuse of discretion.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,
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CERTIFICATE OF SERVICE

I hereby certify that three (3) true and correct copies of the foregoing Petition for Certiorari have been served upon the following by depositing three (3) copies of the same in the United States Mail, postage prepaid, addressed to:

Mr. Barry Nakell
Professor of Law
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This the 1st day of June, 1988.

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